

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

U.S. Vestor, LLC, Altura S. Ewers,

No. C 02-1414 JL

Plaintiffs,

**related cases**

v.

Biodata Information Technology AG, et  
al.,

Defendants.

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Biodata Information Technology North  
America, Inc.

No. C 02-1714 JL

Plaintiff,

**DISMISSAL**

v.

Biodata Information Technology AG, et al.

**Granting Docket # 12, 17**

Defendants.

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**Introduction**

The motion to dismiss of individual defendants Claus Platen, Tan Siekmann and Peter Trautmann and corporate defendant Biodata Systems GmbH ( formerly known as BS Systems GmbH) came on for hearing before this court on July 30, 2003. Jack P. McCowan and Brian P. Maschler, GORDON & REES LLP, appeared for Defendants. Patrick C.

1 Campbell, LAW OFFICES OF PATRICK C. CAMPBELL, appeared for Plaintiffs Altura S.  
2 Ewers and Biodata Information Technology North America ("BITNA").

3 Plaintiff asks this Court to redress the wrongs done to him by Defendants, German  
4 businessmen and German corporations. He claims they conspired to prevent him from  
5 acquiring BITNA, the American subsidiary of a German company, Biodata Information  
6 Technology AG. According to Plaintiff, Defendants bled BITNA dry, stole its customers and  
7 left him with nothing. He is neither an owner nor a shareholder of either company. He is  
8 the only party who resides in the U.S. All the individual and corporate defendants are in  
9 Germany. He asks this Court to overlook or overrule the decisions of the German  
10 Insolvency Administrator who presided over the reorganization of Biodata AG, which led to  
11 changes in BITNA. This Court finds no justification to compel the appearance of German  
12 citizens in an American court, to interfere in the affairs of a German corporation, or to  
13 meddle in the German courts' disposition of the affairs of German citizens and a German  
14 corporation. This Court also takes judicial notice of Judge Spero's ruling in the related case,  
15 and finds that Plaintiff Ewers has no standing to sue on behalf of Plaintiff BITNA.

16 The moving and opposing papers and the arguments of counsel having been fully  
17 considered, and good cause appearing, it is hereby ordered that Defendants' motion is  
18 granted. All causes of action against Defendants are dismissed with prejudice, for lack of  
19 personal jurisdiction. All causes of action brought by plaintiff Altura S. Ewers on behalf of  
20 Biodata Information Technology North America, Inc. ("BITNA") are dismissed with prejudice  
21 for lack of standing to sue.

### 22 Procedural Background

23 All parties to this action consented to the jurisdiction of the magistrate judge as  
24 provided by 28 U.S.C. §636(c). These cases are related to each other and to No. C 02-  
25 2722 JL, Biodata Systems GmbH v Ewers. That case was resolved in May 2003 following a  
26 settlement conference and was dismissed prior to the hearing on this motion.

## Factual Background

Plaintiff Altura S. Ewers ("Ewers") was an officer and director of Biodata Information Technology North America ("BITNA"). This company and its parent in Germany produced and distributed telecommunications and network security products. Products include encryption devices such as "Babylon" for translation of security sensitive data and network security systems such as "BIGfire+" and "SPHINX", which provide protection from unauthorized access for computer networks and systems.

BITNA was once a wholly-owned subsidiary of the German company Biodata AG, now in insolvency proceedings in Germany. In his complaint, Ewers contends he attempted to purchase BITNA and other assets liquidated by the Insolvency Administrator, which is comparable to a Trustee in Bankruptcy in the U.S. Ewers was unsuccessful. Defendant Biodata Systems GmbH (formerly BS Systems GmbH) ("Biodata Systems"), another German company, successfully bid on and purchased the operating assets of Biodata AG and BITNA. Defendant Claus Paten is the President of Biodata Systems and of BITNA.

Defendant Tan Siekmann ("Siekmann") was the CEO of Biodata AG before it was declared insolvent. Defendant Peter Trautmann ("Trautmann"), Mr. Siekmann's attorney, owns a German company, Tom Holdings GmbH, which owns 100% of the shares of Biodata Systems.

Ewers filed his complaint against Biodata Information Technology AG, BS Systems GmbH, Tan Seikmann, Claus Paten, Fritz Westhelle, Jochen Brinkmann, Gerald Burghardt and Peter Trautmann on March 22, 2002, in the "U.S. Vestor" case, C-02-1414 ,on behalf of U.S. Vestor, as an officer and principal shareholder, and on behalf of BITNA, as President. Plaintiffs allege interference with prospective economic advantage, fraud, and conspiracy to interfere with prospective economic advantage.

Ewers filed his complaint against the same defendants on April 10, 2002 in the "BITNA" case, C-02-1714, on behalf of himself as an individual and on behalf of BITNA as a director and officer. Plaintiffs allege the same causes of action as in the U.S. Vestors case, with the exception of the counts for fraud and conspiracy, and add counts for

conversion, money had and received, breach of contract and intentional interference with contract.

Plaintiffs in both cases asserted federal jurisdiction based on diversity of citizenship.

### **Legal Argument - Defendants**

Defendants request the court to:

- 1) Dismiss all claims brought against Defendants Westhelle, Brinkmann, Burghardt and Biodata AG for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2);
- 2) If the court does not dismiss the action for lack of personal jurisdiction, dismiss Counts One, Two, Three and Four in the BITNA Complaint for lack of standing and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6);
- 3) If the court does not dismiss the action for lack of personal jurisdiction, dismiss Counts Five and Six in the BITNA Complaint and Counts One, Two and Three in the Vestor Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6); and
- 4) If the court does not dismiss the action for lack of personal jurisdiction, dismiss any and all remaining claims under the doctrine of *forum non conveniens*.
- 5) Take judicial notice of Judge Spero's injunction in the related case (C-02-2722) and find that Plaintiff Ewers has no standing to sue on behalf of Plaintiff BITNA.

Defendants move to dismiss Plaintiffs' complaint under Rule 12(b)(2), Federal Rules of Civil Procedure, for lack of personal jurisdiction over the individual and corporate defendants, all of whom are citizens of Germany. Defendants contend that Platen, Siekmann, Trautman and Biodata Systems GmbH have not purposefully availed themselves of the privilege of conducting activities in California. Plaintiffs' claims do not arise from Biodata Systems' alleged contacts with California, nor from Siekmann's former ownership of shares in BITNA. Defendants further contend that if this court were to assert

1 personal jurisdiction over Platen, Siekmann, Trautman and Biodata Systems would be  
2 unreasonable.

3 Should this court find it has jurisdiction, Defendants ask the court to dismiss the  
4 counts for interference with prospective economic advantage, conspiracy to interfere and  
5 fraud for failure to state a claim.

6 Defendants also ask this Court to dismiss claims for conversion, money had and  
7 received, breach of contract, or intentional interference with contract, because Plaintiff  
8 Altura Ewers has no standing to sue, either on his own behalf, or on behalf of Biodata  
9 Information Technology North America, Inc. ("BITNA").

10 Defendants support this contention in part with Ewers' stipulation and the preliminary  
11 injunction in the No. C 02-2722 case - -( Hon. Joseph C. Spero) that Biodata Systems AG  
12 is the lawful owner of BITNA, and that Ewers cease and desist from taking any action on  
13 behalf of BITNA. Therefore, Plaintiffs are barred, under the doctrine of collateral estoppel  
14 and res judicata, from any assertions to the contrary.

15 Defendants contend as well that Plaintiffs' claims for fraud, tortious interference with  
16 prospective economic advantage and conspiracy fail to state a valid cause of action under  
17 California law.

18 Defendants ask the court to dismiss any remaining claims under the doctrine of  
19 *forum non conveniens*.

### 20 Legal Argument - Plaintiffs

21 Plaintiffs ask this court to deny Defendants' motion and instead to assume  
22 jurisdiction over Defendants because they "committed tortious acts directed at the plaintiffs  
23 here and . . . purposefully availed themselves of the California courts by having filed suit  
24 here in California against Ewers in the related case." (Plaintiffs' Opp. at 8)

25 Plaintiffs concede that none of the Defendants is domiciled in California (*Id.*).  
26 Plaintiffs invoke the court's general jurisdiction over Biodata Systems AG and GmbH as  
27 parent entities to BITNA. (*Id.* at 9) Plaintiffs proceed on theories of alter ego and agency.  
28 They contend that AG "treated BITNA as if it were an extension of AG," and that the BITNA

1 accounting staff reported directly to AG rather than to Ewers, its sole officer and director.  
2 (Judicial Notice,<sup>1</sup> Ex. 6, Chan Decl. ¶ 1:23-2:2).

3 Plaintiffs accuse AG of taking business from BITNA by executing a contract with  
4 Cylink, a customer that BITNA developed in San Jose, California, and withdrawing  
5 \$600,000 from BITNA's account without its corporate authorization. (Ewers Decl. at 3:11-  
6 13; Judicial Notice, Ex. 3; Ewers Decl., Ex. C).

7 Plaintiffs contend that AG caused BITNA to remain undercapitalized, so that it  
8 ultimately went bankrupt when the Insolvency Administration executed the German  
9 Insolvency Contract, which required BITNA to waive any claims against Biodata Systems  
10 AG. Plaintiffs claim defendant Siekmann was the ultimate winner, emerging as the  
11 guarantor of the German Insolvency Contract, leaving Ewers holding an empty bag.  
12 (Judicial Notice, Ex. 2, McGowan Decl., Ex. A)

13 GmbH acquired all of BITNA's stock as part of the German Insolvency Contract and  
14 defendant Platen, CEO of GmbH, completed the takeover in March 2002, which Ewers  
15 cites as evidence that "GmbH was a co-perpetrator of the fraud and interferences with  
16 prospective business activity and a co-conspirator as well with AG." (Opp. at 11)

17 Defendant Westhelle participated in the conspiracy by writing a letter stating that  
18 "Platen (another defendant) is to carry out his instructions." (*Id.*) Not only was BITNA  
19 stripped of \$600,000, but also of a one million dollar contract with Cylink. (Judicial Notice,  
20 Ex. 4, Smith Decl., Ex. A).

21 Plaintiffs plead with this court to assume jurisdiction lest a foreign company create a  
22 California subsidiary and use it as a pawn to harm Ewers, a California resident.

23 If the Court does not find jurisdiction based on a theory of alter ego, Plaintiffs ask it  
24 to find that BITNA was the agent of AG as defined in *Doe v. Unocal Corp.*, 248 F.3d 915,  
25 928-929 (9<sup>th</sup> Cir. 2001). To constitute agency, this court must find that the subsidiary's

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27 <sup>1</sup> The court may accept declarations outside the pleadings to decide *forum non*  
28 *conveniens* or personal jurisdiction. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988);  
*AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 589-591 (9<sup>th</sup> Cir. 1996).

1 presence substitutes for the presence of the parent. *Id.* Plaintiffs believe AG, through its  
2 CEO, Siekmann, “had BITNA book contracts with BITNA’s customers that were not fully  
3 executed and then order equipment from AG in Germany and its Swiss subsidiary that  
4 were never delivered.” (Opp. at 11) Plaintiffs claim this was a ruse to make AG appear  
5 financially healthy, presumably at BITNA’s expense. Plaintiffs also claim that defendant  
6 Westhelle used BITNA to deceive Ewers and US Vestor that BITNA was financially viable,  
7 to lure Ewers into believing he could purchase BITNA separately and then to leave him out  
8 of the loop in the Insolvency Contract.

9 As additional support for this Court’s jurisdiction, Plaintiffs claim that Defendants  
10 availed themselves of the California forum by filing suit in the related case and that the  
11 Insolvency Contract states that American law is controlling.

12 Plaintiffs contend that Defendants as corporate officers submitted themselves to this  
13 Court’s jurisdiction by committing torts against California residents. *Davis v. Metro*  
14 *Productions, Inc.*, 885 F.2d 515, 521 (9<sup>th</sup> Cir. 1989). Defendants’ acts of fraud and  
15 misrepresentation therefore subject both them and their corporations to this Court’s  
16 jurisdiction. *Taylor-Rush v. Multitech Corp.*, 217 Cal.App.3d 103 (1990). The conspiracy of  
17 two or more defendants may bring in all the defendants. *Textor v. Board of Regents of No.*  
18 *Ill. University*, 711 F.2d 1387, 1392 (7<sup>th</sup> Cir. 1983).

19 Ewers claims Defendants had sufficient contact with the forum through Defendants’  
20 communications with him in California leading him to believe that if he lent money to BITNA  
21 and kept it financially viable he could purchase it himself. (Ewers Decl. at 7:1-8)

22 Plaintiffs contend that Defendants’ foreign acts had a foreign effect – their actions in  
23 Germany and their communications with Ewers from Germany had an effect on a California  
24 citizen and a California corporation. Plaintiffs concede, however, that mere telephone and  
25 mail contacts with minimal physical presence are insufficient to confer jurisdiction. (Opp. at  
26 15) Plaintiffs attempt to distinguish *Davis v. American Family Mutual Ins. Co.*, 861 F.2d  
27 1159, 1160 (9<sup>th</sup> Cir. 1988). In that case a third party agent was sent to represent the foreign  
28 corporation. In the case at bar, AG and GmbH sent their CFO and

1 CEO “to carry out their misrepresentation and interference.”

2 Plaintiffs also contend that the second prong of the specific jurisdiction test is met  
3 because the foreign entities “purposefully directed” their activities at a California resident.  
4 They claim that the Insolvency Administration for AG made misrepresentations to Ewers  
5 that he could purchase BITNA separately at a fair price, inducing him to lend money to  
6 BITNA and keep it operating in California. Then the Administration withdrew that  
7 opportunity, and told him he must bid on AG as a whole. Plaintiffs cite a series of telephone  
8 calls defaming Ewers and thwarting his attempts to act on behalf of BITNA as evidence of a  
9 conspiracy.

10 Plaintiffs claim that this forum’s exercise of jurisdiction is presumptively reasonable  
11 because purposeful availment has been established. They observe that GmbH asked this  
12 court to enjoin actions of parties in California and obtained a preliminary injunction against  
13 Ewers and a possible judgment, which this court would enforce.

14 Plaintiffs do not see this Court’s jurisdiction as interference with German  
15 sovereignty, because they allege wrongdoing against a California corporation (Opp. at 18).  
16 The German insolvency proceedings, they believe, are irrelevant to the issue of money  
17 loaned to BITNA “based on the misrepresentations of the Insolvency Administration.” They  
18 cite no other basis for the reasonableness of this Court’s assuming jurisdiction. (*Id.*)

19 Plaintiffs contend that the forum state has an interest in the adjudication of a dispute  
20 involving a California corporation. The German Insolvency Contract even provides that  
21 American law will be controlling. Plaintiffs also contend that because defendant Platen is  
22 CEO, CFO and Secretary of a California corporation and because this lawsuit “is about  
23 fraud and interference against Ewers and US Vestor” that California is the most efficient  
24 forum. (*Id.*) Even though an alternative forum is available in Germany, Plaintiffs contend  
25 that both Siekmann and Platen have adequate contacts with California to support  
26 jurisdiction here because they “wrongfully orchestrated and directed (in conspiracy with  
27 other Defendants as part of the insolvency of AG) the acquisition of the rights and assets  
28 described in the complaint. . .” (Opp. at 19)



## **Analysis and Conclusion**

In order for this court to exercise personal jurisdiction over Defendants, Plaintiffs must demonstrate that:

- (1) Defendants performed acts or transactions within the forum or otherwise purposefully availed themselves of the privilege of conducting activities within the forum;
- (2) Plaintiffs' claims arise out of or result from Defendants' activities in the forum; and
- (3) Exercise of this court's jurisdiction is reasonable. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9<sup>th</sup> Cir. 2000). Plaintiffs fail all three tests.

### **1) Defendants did not purposefully avail themselves of the California forum.**

#### **A) Biodata AG was not BITNA's alter ego**

Plaintiffs assert this court's jurisdiction over Biodata AG based on theories of alter ego and agency – that Biodata AG was BITNA's alter ego and was therefore in the same position as BITNA, its California subsidiary, and therefore subject to this Court's jurisdiction. To support this theory, Plaintiffs would have to prove that (1) there is such unity of interest and ownership that the separate legal personalities of the two entities no longer exist; and (2) recognizing their separate legal identities would result in fraud or injustice. *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9<sup>th</sup> Cir. 2001).

Ewers can proffer only a handful of actions by AG, none of which show anything more than normal corporate oversight by a parent of a subsidiary. For example: [AG] "told Ewers and BITNA to book revenues before contracts were fully executed;" BITNA's accounting staff reported to AG; AG "bypassed BITNA" by executing a business contract directly with a U.S. customer named Cylink; and finally, AG withdrew \$600,000 from BITNA's account without its "authorization." (Vestor Opp. at 10; BITNA Opp. at 8-9). In addition, Plaintiffs allege that after AG filed for bankruptcy, the German Insolvency Administrators disregarded BITNA's separate existence by ignoring Ewers' requests to

1 return the \$600,000 and refusing to compensate BITNA for revenues lost from the Cylink  
2 contract. (Vestor Opp. at 10, BITNA Opp. at 9). The Court finds that these actions, even  
3 taken together, do not represent the pervasive dominance and control necessary to pierce  
4 AG's corporate veil and confer jurisdiction.

5 **B) A subsidiary's minimum contacts do not confer jurisdiction over the parent**  
6 **corporation.**

7 The fact that on March 18, 2002 Biodata Systems purchased a controlling interest in  
8 a California subsidiary, BITNA, does not suffice to confer jurisdiction in this Court over the  
9 parent company. It is well settled that "[t]he existence of a relationship between a parent  
10 company and its subsidiaries is not sufficient to establish personal jurisdiction over the  
11 parent on the basis of the subsidiaries' minimum contacts with the forum." *Doe v. Unocal*  
12 *Corp.*, 248 F.3d 915, 925 (9<sup>th</sup> Cir. 2001), citing *Transure, Inc. v. Marsh & McLennan, Inc.*,  
13 766 F.2d 1297, 1299 (9<sup>th</sup> Cir. 1985). *See also American Tel. & Tel. Co. v. Compagnie*  
14 *Bruxelles Lambert*, 94 F.3d 586 at 590 (9<sup>th</sup> Cir. 1996) (where foreign parent company  
15 conducted no business and maintained no offices in California, mere fact that it maintained  
16 a majority interest in a California subsidiary did not suffice to confer jurisdiction.)

17 **C) Defendants only filed suit in California because of the actions of Plaintiffs**

18 Plaintiffs' contention that Defendants have availed themselves of this forum by filing  
19 suit in No. C 02-2722 is disingenuous. Biodata Systems was forced to file suit in this district  
20 because Ewers, after he was removed from office as a director of BITNA, and after BITNA  
21 had been sold to Biodata Systems, went to BITNA's offices and took property, including  
22 computers and servers. He also re-registered the BITNA domain name, and began  
23 diverting customers. The new domain name service would not return the name to Biodata  
24 Systems without a court order. (McCowan Decl. In Support of Motion for Temporary  
25 restraining Order in Vestor Case, C-02-2722 JCS, at p. 8., Ex. G to Plaintiffs' Request for  
26 Judicial Notice). Defendants' recourse to this court to rescue their property does not bind  
27 them for all other proceedings.  
28

**D) A business trip is not enough contact to establish jurisdiction**

Jurisdiction does not attach merely because two of the officers of the German corporations visited California on a business trip. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1443 (9<sup>th</sup> Cir. 1987) (holding that temporary physical presence of a corporation's officer in California is insufficient to establish purposeful interjection); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029-1030 (5<sup>th</sup> Cir. 1983) (finding no purposeful availment by defendant corporation even though officers of the corporation visited the forum state twice to inspect plaintiff's facilities.)

**2) Defendants did not act within the forum to harm Plaintiffs**

Plaintiffs cannot prove that Defendants have sufficient activities with in California to constitute minimum contacts, the first prong of the jurisdiction test; they argue instead that California jurisdiction may be inferred from two alternate theories: conspiracy and the foreign-acts-with-foreign-effects-test.

**A) Plaintiffs' foreign act with foreign effect theory fails for insufficiency**

**i) The conspiracy claims are insufficient to confer jurisdiction**

The conspiracy claims are insufficient because California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant. *City and County of San Francisco v. Philip Morris*, 1998 U.S. Dist. Lexis 3056 at \*28 (N.D.Cal. , March 3, 1998); *Mansour v. Superior Court*, 38 Cal. App. 4<sup>th</sup> 1750, 1760 (1995). The torts Plaintiffs complain of are also insufficient to confer jurisdiction. The effects test is only satisfied when a resident of the forum state alleges that a defendant knowingly targeted him and caused him harm. *Bancroft & Masters*, 223 F.3d at 1087.

**ii) Assurances are not misrepresentations**

Plaintiffs allege that the German Insolvency Administrators made the following misrepresentations to Ewers: 1) that he would be able to purchase BITNA; 2) that an investor other than Tan Siekmann would be found to keep Biodata AG afloat; and 3) that Ewers had to bid on Biodata AG as a whole and that Siekmann would not be involved. (Vestor Opp. at 16). These are not actionable misrepresentations, because they are merely

1 assurances. Such communications did not create the potential for immediately  
2 extinguishing any contractual, property or other rights of Plaintiffs, and therefore are  
3 insufficient to create jurisdiction by their effects. *Cognigen Networks, Inc. v. Cognigen*  
4 *Corp.*, 174 F.Supp. 2d 1134, 1139-1140 (W.D. Wash. 2001)..)

5 Plaintiffs fail to show that their injuries would not have occurred but for Defendants'  
6 conduct. *Hancock v. Hitt*, 1998 U.S. Dist. Lexis 10058 at \*15 (N.D.Cal. June 19, 1998). In  
7 the *Vestor* complaint, Plaintiffs contend that they were injured because Defendants did not  
8 conduct a legitimate auction of Biodata AG's assets, that is, one in which Ewers could  
9 purchase BITNA separately from AG's other assets and the Insolvency Administrators were  
10 looking for an investor other than Siekmann.

11 Defendants point to the timing of Plaintiffs' complaints as undermining their  
12 legitimacy. Ewers claims that the misrepresentation that he could purchase BITNA  
13 separately was made before there was any plan to auction Biodata AG's assets (Ewers  
14 Decl. at 17, 20); the second alleged misrepresentation, regarding an investor other than  
15 Siekmann, is unrelated to the claim that the auction was rigged in Siekmann's favor; and  
16 the claim that Ewers was deceived that he could bid on AG as a whole and that Siekmann  
17 would not be involved is alleged to have been made after Plaintiffs were already directly  
18 involved in the auction process (*Vestor Opp.* at 16). Consequently, Ewers' alleged  
19 exclusion from the bidding process could not have been caused by the alleged  
20 misrepresentations. The second prong of the jurisdictional test is not satisfied: Plaintiffs'  
21 claims do not arise out of Defendants' activities within the forum.

22 **iii) Defendants' actions were not against Plaintiffs**

23 In the BITNA Opposition, Ewers alleges two slightly different but related instances of  
24 interference by AG and the Insolvency Administrator: 1) that the Insolvency Administrator  
25 asked him to lend money to BITNA; and 2) that the Defendants negotiated and executed  
26 the Sales Contract. He alleges a third interference by GmbH – that it sent Platen to  
27 California to remove Ewers from his position as an officer and director of BITNA, and  
28 incidentally, to reclaim the BITNA computers and servers containing its domain name

1 and other intellectual property.

2 Plaintiffs cannot credibly characterize any of these actions as a tort and, therefore, a  
3 basis for this court's jurisdiction over any of the Defendants. When Defendants removed  
4 funds from BITNA's accounts and extinguished BITNA's rights against the parent company  
5 as part of the Distribution Agreement, they were acting against BITNA, not Ewers. Ewers  
6 was not a party to the Distribution Agreement and owned no shares of BITNA stock. He  
7 was neither targeted nor injured. The requirement of harm to Plaintiffs resulting from  
8 Defendants' activities in the forum is not met.

9 **3) Exercise of jurisdiction by this court would not be reasonable.**

10 The third prong of the specific jurisdiction test is whether such jurisdiction would be  
11 reasonable. The reasonableness requirement may defeat California jurisdiction even if a  
12 defendant has purposefully engaged in California activities. *Rippey v. Smith*, No. C-99-  
13 1488, U.S. Dist. Lexis 17361 at \*10 (N.D.Cal. Oct. 28, 1999), *aff'd*, N. 99-17496, 2001 U.S.  
14 App. Lexis 13303 (9<sup>th</sup> Cir. June 6, 2001). This court must consider seven factors to  
15 determine whether it is reasonable to assert personal jurisdiction over Defendants in this  
16 case:

- 17 1) the extent of the defendant's purposeful injection into the forum state's affairs;
- 18 2) the burden on the defendant of defending in the forum;
- 19 3) the extent of conflict with the sovereignty of the defendant's state;
- 20 4) the forum state's interest in adjudicating the dispute;
- 21 5) the most efficient judicial resolution of the controversy;
- 22 6) the importance of the forum to the plaintiff's interest in convenient and effective  
23 relief; and
- 24 7) the existence of an alternative forum.

25 *Rippey*, 1999 U.S. Dist. Lexis at \*9-10.

26 In the case at bar, Plaintiffs concede that factors 6 and 7, convenient and effective  
27 relief for the plaintiff and existence of an alternative forum, favor Defendants. (Vestor Opp.  
28 at 18-19; BITNA Opp. at 17-18).

1 Plaintiffs do not effectively rebut the other five factors.

2 Factor 1 has been discussed above – Defendants’ actions within the forum are not  
3 sufficient to confer jurisdiction.

4 Plaintiff’s only argument denying factor 2, burden on Defendants, and factor 4,  
5 California’s interest in this litigation, is that Defendants were aware that the Sales Contract  
6 for the sale of BITNA to Biodata GmbH is governed by American law. (Vestor Opp. at 17-  
7 18; BITNA Opp. at 17).

8 The Plaintiffs’ position that the choice of American law in the Sales Contract for  
9 BITNA confers jurisdiction on this court overstates its significance. The Sales Contract for  
10 the sale of BITNA to Biodata Systems AG provides for transfer of the seller’s “participating  
11 interest” in BITNA. The seller is Dr. Fritz Westhelle, as administrator in insolvency  
12 proceedings for Biodata Information Technology AG, represented by Dr. Jochen  
13 Brinkmann. The buyer is Biodata Systems GmbH, represented by its managing director  
14 Claus Platen. Paragraph Nine of the Sales Contract provides:

15 “The parties are aware that the transfer of the participating interest in the company is  
16 governed by American law. Should the present contract still fail to comply with the  
17 conditions necessary to transfer the participating interests in the company  
18 effectively, the parties commit themselves to undertaking all legal acts, which under  
19 American law are necessary for the transfer of the participating interests in the  
20 company.”

21 (Ex. A to Plaintiffs’ Request for Judicial Notice)

22 Contrary to Plaintiffs’ contention, the German Insolvency Contract provision that  
23 “American law will be controlling” does not confer jurisdiction on this Court. This provision  
24 merely requires the parties to follow American law as necessary to effect the transfer of  
25 Biodata Systems AG’s interest in BITNA to Biodata Systems GmbH.

26 With regard to factor 5, the extent of conflict with the sovereignty of Defendants’  
27 state, such a conflict would be created if this Court took jurisdiction away from the German  
28 courts which have been dealing with the affairs of these companies.

1 The German Insolvency Administrator should not be burdened with this Court's  
2 interference in its attempts to maintain Biodata Systems AG's viability. Plaintiffs' complaint  
3 challenges the Administrator's conduct of proceedings in Germany under the auspices of  
4 the German court. Any ruling by this court that the auction of AG's assets, including BITNA,  
5 was improper, would undermine the right of the German courts to conduct their bankruptcy  
6 proceedings without interference from a foreign judge.

7 Any attempt to resolve this dispute in California would be an unreasonable hardship  
8 for Defendants, all of whom are citizens of Germany, and indeed for all the parties, since all  
9 the evidence relating to Plaintiffs' claims is in Germany. Even the present CEO, CFO and  
10 Secretary of BITNA is Mr. Platen, a German citizen living and working in Germany.  
11 Plaintiffs concede this. (Vestor Opp. at 6-7)

12 Plaintiffs cannot dispute that German courts constitute an adequate forum for  
13 resolution of this dispute, in satisfaction of factor 7, and that the most efficient resolution of  
14 the matter would be in Germany, satisfying factor 5. The vast majority of the parties,  
15 witnesses and evidence are in Germany. The events leading up to these lawsuits occurred  
16 in Germany. The sale of the assets of Biodata AG that forms the basis of Plaintiffs'  
17 complaints was conducted according to German law by representatives of the German  
18 court.

19 This Court also finds justification for dismissing Plaintiffs' claims in the doctrine of  
20 *forum non conveniens* and *stare decisis*.

21 **4) Dismissal is proper under the doctrine of *forum non conveniens*.**

22 Any claims over which this court might theoretically have jurisdiction under some  
23 tenuous theory should be dismissed under the doctrine of *forum non conveniens*, so they  
24 may be resolved in Germany.

25 To obtain dismissal for *forum non conveniens*, Defendants need only show: 1)  
26 existence of an adequate alternative forum and 2) that the balance of private and public  
27 interest factors favor dismissal. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d  
28 764, 767 (9<sup>th</sup> Cir. 1991).

**A) Germany is an adequate alternative forum.**

The requirement of an adequate alternative forum is generally satisfied if the defendant is amenable to service in the alternative forum. *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9<sup>th</sup> Cir. 2001). As German citizens and corporations, all Defendants are amenable to service of process in Germany.

**B) Private and public interest factors favor Germany as the forum.**

If there is an adequate alternative forum, the court balances the private and public interest factors to decide whether to dismiss on grounds of *forum non conveniens*. *Lockman*, 930 F.2d at 769.

The private interest factors include the ease of access to sources of proof, the availability of compulsory process to obtain attendance of hostile witnesses, cost of transporting friendly witnesses, ability to enforce the judgment, and any other problems which might interfere with an expeditious trial. *Leetsch*, 260 F.3d at 1104. All these factors weigh in favor of the German forum

**i) Sources of proof are in Germany**

The vast majority of the evidence and witnesses are in Germany.

**ii) Compulsory process favors Germany**

Compulsory process also favors Germany since all Defendants and almost all of the relevant witnesses are German citizens residing in Germany.

**iii) Judgments would be enforceable in Germany**

Judgments would be enforceable in Germany since all Defendants own property there. Germany is the only forum in which all of the issues related to the sale of Biodata AG's assets may be expeditiously litigated and the German insolvency proceedings are the source of Plaintiffs' claims. *See Lockman*, 930 F.2d at 770 (holding that policy favoring expeditious trial weighed in favor of Japanese forum since U.S. court's keeping the case would result in duplicate lawsuits in U.S. and Japan).

The public interest factors making a forum inconvenient include: 1) administrative difficulties flowing from court congestion; 2) imposition of jury duty on people in a



1 community that has no relation to the litigation; 3) local interest in having local  
2 controversies litigated locally; 4) interest in having a diversity case tried in the forum familiar  
3 with the governing law; and 5) avoidance of unnecessary conflicts of law. *Leetsch*, 260  
4 F.3d at 1105. These factors also weigh heavily in favor of Germany, rather than California,  
5 as the proper forum.

6 **iv) Public interest factors disfavor California as the forum.**

7 The U.S. District Court for the Northern District of California is a busy court. Trying  
8 this case here would require translating law and testimony into and from German. It would  
9 be an imposition to ask California jurors to decide a dispute concerning German citizens,  
10 corporations and property. This is not a local controversy, since all of the assets and rights  
11 at issue are located in Germany and all the culminating events occurred in Germany.  
12 California has little interest in the liquidation of a German corporation, especially under the  
13 auspices of a German court. German law, unfamiliar to this forum and its citizens, governs  
14 much of this dispute. This Court is in effect being asked by Plaintiffs to pass judgment on  
15 the acts of a German court. For all the above reasons, these complaints should be  
16 dismissed under the doctrine of *forum non conveniens*.

17 **5) Under the doctrine of *stare decisis*, dismissal of claims brought by Ewers in**  
18 **behalf of BITNA should be dismissed because Ewers lacks standing to sue on behalf**  
19 **of BITNA.**

20 The district court (Hon. Joseph C. Spero) on August 19, 2002 entered a preliminary  
21 injunction which reflects the stipulation of the parties. Paragraph three of the terms of the  
22 injunction provides that Ewers is ordered to:

23 “ Cease and desist from taking any action on behalf of Plaintiff or any of its  
24 subsidiaries, including BIODATA Information Technology North America, Inc.  
25 (“BITNA”) (collectively “Biodata”).

26 (Ex. B. To Defendant’s Memo of Points & Authorities in Support of Motion to  
27 Dismiss).

1 This court takes judicial notice of the preliminary injunction and finds that under the  
2 doctrine of *stare decisis* it effectively removes any standing Ewers may have had to act on  
3 behalf of BITNA and accordingly removes yet another contention in support of jurisdiction in  
4 this court.

5 **Conclusion and Order**

6 For all the above reasons, all causes of action against all Defendants in both  
7 complaints in the related cases are dismissed with prejudice for lack of personal  
8 jurisdiction. All claims by Plaintiff Ewers on behalf of BITNA are dismissed with prejudice for  
9 lack of standing to sue. The clerk shall close the file.

10 IT IS SO ORDERED.

11 DATED: October 2003

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James Larson  
United States Magistrate Judge  
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